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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 545 14

**IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS
CORPUS FOR HARRY A. GROBAN AND NATHAN
GROBAN**

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

APPELLEE'S JURISDICTIONAL STATEMENT

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APPELLEE'S JURISDICTIONAL STATEMENT

The question at issue in this cause is set forth in Section VI of the Petitioners-Appellants' jurisdictional statement (at page 2). That question is whether or not Section 3737.13 of the Revised Code of Ohio, which gives to the Fire Marshal of the State of Ohio, while conducting an investigation into the origin of a fire, the right to compel the attendance of witnesses at such investigation and exclude the counsel of the witnesses from the place where such an investigation is held, contravenes the Fourteenth Amendment to the Constitution of the United States or abrogates any right guaranteed to the Petitioners-Appellants by such amendment. The Petitioners-Appellants erroneously answer this question in the affirmative by treating an investigation as though it were a hearing of a quasi-judicial nature, when in fact such an investigation conducted by the State Fire Marshal under this statute is only to determine facts relating to the origin of a fire so

that such facts may be made available to the proper administrative agency and such action as is deemed necessary may be instituted.

I. The Petitioners-Appellants fail to recognize the distinction between an investigation and a hearing. This distinction is recognized in numerous cases including the case of *Bowles v. Baer*, reported in 142 Federal (2d) 787, decided by the United States Circuit Court of Appeals of the 7th Circuit on May 25, 1944. The facts of that case arose from an investigation similar in nature to that under consideration in the instant case in that the price administrator, under the provisions of the Emergency Price Control Act of 1942, ordered the defendants to appear without attorneys and without a court reporter for a private investigation by the price administrator. The court in its opinion clearly pointed out the distinction between hearings and investigations. The court stated that investigations are, in effect, informal proceedings held to obtain information to govern further action and they are not proceedings in which action is taken against anyone. On the other hand, hearing contemplates parties, a determination of the law and facts at issue, and a conclusion whereby the right of such parties may be affected. In the latter case, that is, of hearings, parties are entitled to have their attorneys present.

In effect, an investigation by an administrative body is akin to the investigations conducted by Grand Juries. See *Genecov, et al. v. Federal Petroleum Board*, 146 Federal (2d) 596. Certiorari denied 65 S. Ct. 913. Grand Jury investigations have for years been conducted in secret and the testimony there elicited becomes the basis, perhaps, for further action. This is not violative of the Fourteenth Amendment of the Constitution of the United States. See *United States v. General Supply Association, et al.*, 34 Federal Supplement 241. The court in that case referred to

that part of the Fifth Amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury. The court then stated:

“That is the only constitutional guaranty regarding the Grand Jury. After the presentment or indictment other guarantees come into play. The accused has then a right to an open trial, to confront the witnesses, to have the assistance of counsel, and trial by jury. These provisions, however, do not affect the deliberations of the Grand Jury.”

II. The second point to which the Respondent-Appellee wishes to direct the court's attention is that the Petitioners-Appellants, during the fire marshal's investigation, refused even to be sworn. There is nowhere in the law interpreting the Fourteenth Amendment of the United States Constitution any provision or holding which would protect a person refusing to take an oath because his counsel is not present. In fact, the United States Circuit Court of Appeals for the 9th Circuit in *Goodman v. United States*, reported in 108 Federal (2d) 516, specifically held that even compelling a witness to take an oath of secrecy prior to his testifying before the Grand Jury does not violate either the Fifth or Sixth Amendment of the United States Constitution nor does it deprive him of life or liberty without due process of law.

III. It is therefore respectfully submitted that inasmuch as the Petitioners-Appellants in this case refused to take an oath because their counsel could not be with them, the question of whether or not the cloak of protection of the Fourteenth Amendment was upon them is prematurely raised. Secondly, even if the Petitioners-Appellants had

been sworn but refused to answer questions because their counsel was not present, this, as an investigation by an administrative body, does not deprive anyone of any right protected by the Fourteenth Amendment. This investigation is similar in nature to a Grand Jury investigation and it is only if charges should subsequently be brought against these individuals that they could be said at such subsequent time to be placed in jeopardy.

Respectfully submitted,

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